2009

Osmond Lane Homeowners Association, an unincorporated association v. George C. Landrith, Jr. : Reply Brief

Utah Court of Appeals

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UTAH COURT OF APPEALS

OSMOND LANE HOMEOWNERS ASSOCIATION, an unincorporated association,	:	
Appellee Plaintiff	:	Appeal No. 20090[illegible]
vs.	:	
GEORGE C. LANDRITH, JR.,	:	
Appellant Defendant.	:	

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (cont.)

TABLE OF CONTENTS (cont.)

TABLE OF AUTHORITIES

I. THE TRIAL COURT ERRORED IN GRANTING THE ASSOCIATION'S MOTION FOR SUMMARY JUDGMENT.

A. The Association's claim that it "acted as the governing body pursuant to the Declaration for 27 years" is not supported by the evidence.

The Association claims that it "has acted as the governing body pursuant to the Declaration for twenty seven (27) years." Appellee's Brief, pg. 20. However, the Association does not dispute the many differences between the Association and the "George Osmond Estates Council" - the entity described in the Declaration. Id., pp. 18-23. Furthermore, in its Brief the Association has made no effort to explain how the Association could have "acted as the governing body pursuant to the Declaration for twenty seven (27) years" when the Association had a different name than the entity described in the Declaration, was a different type of entity, had a different governing body, had different memberships rights, had a different method of assessing fees, and had a different method of enforcing assessments. Id. The differences between the Association and the entity described in Declaration are summarized below.

Difference between the Entity Described in the Declaration and the Association	
The Entity Described in Declaration	The Association
The entity authorized to act under the Declaration is the "George Osmond Estates Council" See Declaration, Section 1.1	The Association is the "Osmond Lane Homeowners Association" R. 30.
The "George Osmond Estates Council" was to be organized as a non-profit corporation. See Declaration, Section	The Association claims to be an unincorporated association. R. 30.

1.1(c).	
The "George Osmond Estates Council" was to be governed by a "Board of Managers." See Declaration, Section 1.1(J).	The Association is governed by president, vice-president and secretary. See, e.g., R. 301.
The Declaration provided that homeowners were to have "voting rights" as "specified in the Articles of Incorporation" for the George Osmond Estates Council. See Declaration, Section 4.3.	The Association has no "Articles of Incorporation" and has created no document granting the homeowners any "voting rights."
The George Osmond Estates Council was to make "annual assessments," one-half of which would be due on January 1 and July 1 of each year. See Declaration, Section 6.6.	The Association makes annual assessments that are due in full on January 10 of each year. R. 697.
The George Osmond Estate Council was to provide copies of its articles of incorporation and the by-laws to all new purchasers of property within the Subdivision. See Declaration, Section 4.2.	The Association does not provide copies of any articles of incorporation or any other organizational documents to new purchasers. R. 528-529, 697.
The George Osmond Estates Council was to collect unpaid homeowners association fees through a "continuing lien" procedure described under Section 6.8 of the Declaration. Declaration, Section 6.8.	The Association collects unpaid homeowners association fees by filing mechanic's liens. See Minutes of Osmond Lane Homeowners Association dated May 7, 1980, R. 148. ("[E]ach lot owner pay $100.00 for maintaining the center divider. This check is to be paid in 30 days or an extra $25.00 late charge for the next 30 day period and then a mechanic's lien will be placed on the property.") (Emphasis added.) See also May 12, 1980 minutes R. 149. ("If not received [with the next 30 days], a mechanics lien will be placed on the property.) (Emphasis added.)

As evidence that the Association has "acted as the governing body pursuant to the Declaration for 27 years" the Association states that it has "collected assessments" from homeowners. Appellee's Brief, pg. 20. It is not necessary to have authority to act under a recorded declaration to "collect assessments." In this case, the Association has "collected assessments" by filing "mechanic's liens" against the property of homeowners that failed to pay assessments - not pursuant to the procedure set forth in the Declaration.[1] See Appellant's Brief, pg. 7; R. 148-149.

As evidence that the Association has "acted as the governing body pursuant to the Declaration for 27 years" the Association also claims that it has "enforced" the restrictive covenants of the Declaration. Appellee's Brief, pg. 20. However, the Association has failed to identify any homeowner (other than Landrith) against whom the Association has attempted to enforce the restrictive covenants of the Declaration. Id., pp. 20-23.

Finally, the Association argues that the Association is "a dba [registered] with the State of Utah." Id., pg. 21. In its Complaint, the Association claimed that it was an "unincorporated association." R. 30. In its Brief, the Association now claims it is a "registered dba." Appellee's Brief, pg. 21. The Association was, in fact, "registered" on April 22, 2002 with the Utah Department of Commerce as a dba of Nevin Anderson. See

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[1]Under the Declaration, assessments were to be collected through a "continuing lien" procedure described in Section 6.8 of the Declaration. "Mechanic's liens" are filed to secure payment for improving, repairing or maintaining real property pursuant to the Utah Mechanic's Lien Act. See Utah Code Ann. Section 38-1-1 et seq.

Addendum A hereto. Whether the Association is an "unincorporated association" (as the Association claimed in the Complaint) or a "registered dba" of Nevan Anderson (as the Association now claims in its Brief), it is undisputed that the Association is not a "non-profit corporation," as described in the Declaration.

B. The Association's claim that other property owners have "recognized and ratified" the Association as having authority to act under the Declaration is not supported by the evidence.

The Association next claims in its Brief that other property owners have "recognized and ratified" the Association as having authority to act under the Declaration. Appellee's Brief, pp. 20-21. The fact that homeowners may have paid assessments to the Association, or attended annual meetings, does not mean those homeowners ever recognized the Association as the entity described in the Declaration. As discussed above, the Association was not organized as the entity described in the Declaration, and has not operated in the same manner as the entity described in the Declaration.

Even if this did constitute evidence that other homeowners had "recognized and ratified" the Association as the entity described in the Declaration, that does not mean that Landrith ever "recognized or ratified" the Association as the entity described in the Declaration. As discussed below and in Appellant's Brief, Landrith did not. See Appellant's Brief, pp. 12-14, 32-33.

C. The Association's claim that Landrith has "ratified" the Association as having authority to Act under the Declaration is not supported by the evidence.

In its Brief, the Association claims that Landrith ratified the Association's authority to act under Declaration since the Declaration was recorded against the Property at the time Landrith purchased the Property. Appellee's Brief, pg. 22. However, the Association was not the entity described in the Declaration. When the Association attempted to assert authority against Landrith under Declaration - Landrith objected:

> I do not now and have never consented to, acknowledged or ratified the [the Association] as having authority to make repairs to my property without my consent, or incur legal fees in connection therewith, or lien and foreclose my property to collect the same.
>
> I do not now and have never consented to, acknowledged or ratified the [the Association] as having authority to act as the George Osmond Estates Council under the Declaration.

Supplemental Affidavit of George Landrith, ¶ 7-8, R. 697.

The Association claims that Landrith "ratified" the Association as having authority to act under the Declaration since he paid homeowner fees and special assessments to the Association and attended one annual meeting. Appellee's Brief, pp. 21. Landrith recognized the Association for what it was - an association of homeowners in the Subdivision that was addressing common homeowners concerns, collecting annual dues and paying common expenses of homeowners within the Subdivision - but nothing more.

The Association claims that Landrith "ratified" the Association as having authority to act under the Declaration since he reimbursed the Association for some "repairs and

maintenance" made to the Property. As discussed in detail in Appellant's Brief, Landrith reimbursed the Association for "repairs and maintenance" on two occasions - once under written protest[2] and once under an agreement recorded by Anderson in his journal that the Association would make no future "repairs or maintenance" on the Property without Landrith's prior consent.[3] Appellant's Brief, pp. 12-13, 32-33.

In reviewing a motion for summary judgment, all facts and inferences must be reviewed in a light most favorable to the non-moving party. Surety Underwriters v. E&C Trucking, Inc., 2000 UT 71, ¶ 15, 10 P.3d 338 (Utah 2000). "[S]ummary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Norman v. Arnold, 2002 UT 81, ¶ 15, 57 P.3d 997 (Utah 2002).

In this case, viewing all "facts and inferences" in a light most favorable to Landrith - the nonmoving party on the Association's Motion for Summary Judgment - at best, there was a genuine issue of material fact as to whether the Association had ever "acted as" the entity authorized to act under the Declaration or as to whether Landrith ever ratified the Association as the entity described under the Declaration. Viewing the evidence in a light

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[2]Landrith reimbursed the Association $1,113.50 for "repairs and maintenance" under a cover letter stating "my payment of this invoice is NOT any agreement on my part as to the legitimacy of the enclosed invoice." Appellant's Brief, pg. 12.

[3]Anderson recorded in his journal that Landrith and Anderson agreed that Landrith would pay the Association's requested reimbursement for "repairs and maintenance," but only on the condition that "repairs in the future will only be done with my approval and prior notice and discussion with [Landrith]." Appellant's Brief, pg. 13.

most favorable to Landrith, there were material issues of fact in dispute and the trial court errored in granting the Association's Motion for Summary Judgment

II. THE TRIAL COURT ERRORED IN DENYING LANDRITH'S MOTION FOR SUMMARY JUDGMENT.

Based on the undisputed facts, the Association was not the entity described in the Declaration. At the time it was organized, the Association chose not to organize itself as the entity described in the Declaration, and has operated in a manner entirely different than the entity described under the Declaration. The Association has not disputed the differences between the Association and the entity described in the Declaration. See Appellee's Brief, pp. 18-23.

As a matter of law, it is not necessary to act under a recorded declaration to collect "assessments" or to hold annual meetings. The Association has not disputed that it has collected assessments by filing "mechanic's liens" - not pursuant to the collection procedure set forth in the Declaration. Id. The Association has not disputed that it has never sought to enforce the restrictive covenants under the Declaration against any homeowner other than Landrith. Id. To claim authority to act under the Declaration, at a minimum the Association must bear some resemblance to the entity described in Declaration. In this case, the Association bears no resemblance to the entity described in the Declaration. The trial court errored in denying Landrith's Motion for Summary Judgment.

III. SECTION 8.4 OF THE DECLARATION IS INAPPLICABLE IN THIS CASE.

The Association next claims that in constructing the two retaining walls on the Property and suing Landrith for the cost of construction, the Association was actually acting pursuant to Section 8.4 of the Declaration - not as the entity described in the Declaration. Section 8.4 of the Declaration provides that "if any person...violates the provisions of this instrument, it shall be lawful for [another property owner] to institute proceedings at law or in equity to enforce the provisions of this instrument." Declaration, Section 8.4.

In its Motion for Summary Judgment and at trial, the Association proceeded against Landrith under Sections 6.11 and 6.12 of the Declaration (claiming to be the "George Osmond Estates Council"), not as an interested property owner as described under Section 8.4 of the Declaration. See R. 472. Furthermore, Section 8.4 does not authorize a property owner to make repairs to another property without that property owner's consent, or to lien the property and foreclose on that lien to recover the cost of those repairs. Section 8.4 only authorizes a property owner to enforce restrictive covenants in the Declaration by initiating a proceeding "to enforce the provisions of [the Declaration]," i.e., Section 8.4 only authorizes a property owner to file an action to have the Court order another property owner to comply with restrictive covenants in the Declaration.

In this case, the Association did not bring an action under Section 8.4 to have the court order Landrith to fix the erosion. Instead, the Association fixed the erosion, claiming authority to do so under Section 6.11 (claiming authority to act as the George Osmond Estates Council), and then brought an action to foreclose the lien it had filed against the Property to recover the cost of repair pursuant to Section 6.12. Those actions could have only been undertaken by the George Osmond Estate Council (the entity authorized to act under the Declaration.)

IV. THE COURT ERRORED IN EXCLUDING RILEY BRATT AS AN EXPERT WITNESS.

In this case, Landrith claimed that the Association breached its duty to mitigate damages by building two interlocking brick retaining walls at a cost of $32,878.93, when the Association could have resolved the same problem by constructing a rock retaining wall for a much lower cost.[4] The Association did not dispute Landrith's analysis that the Association's duty to mitigate damages included a duty to use less expensive alternative means to fix the erosion problem. See Appellee's Brief, pg. 30. The Association claims, however, that Riley Bratt did not have the requisite qualifications to testify as an expert witness that a rock retaining wall would have satisfactorily resolved the erosion problem because Bratt was not an engineer and because Bratt examined the site after the two brick retaining walls had been installed. Id.

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[4]The cost of constructing a rock retaining wall was a base cost of $7,252.00, that would not have exceeded $11,452.00. See Appellant's Brief, pg. 38; R. 680-82.

At trial, Bratt testified that he had "been building rock walls for eight years." R. 1548, p. 286. Bratt testified that in preparation for giving his opinion he physically inspected the site and also reviewed the engineering plans for the two retaining walls constructed by the Association. R. 1548, p. 292. Mr. Bratt also attended the trial and listened to the testimony of Kirk Johnson, the individual that constructed the two brick retaining walls for the Association. Id. Mr. Bratt described other work he did in preparation for giving his opinion as follows:

> I got the information I needed, and I sat down and came up with a square foot price for this wall - how many square feet is going to go into a wall with - when you build a rock wall, you've got to make sure that you have - you've got two feet in the ground, and the - what happens is you've got a surcharge.
>
> If you have a rock wall that's built, you've got to have it so it has a pitch back as the other gentlemen was talking with his block wall. Same thing with a rock wall. You've got a surcharge that comes down against the wall, and you've got to make sure that you have a pitch on that wall, and you've got to make sure you have the geogrid in a row to make sure that that - that the weight of the earth doesn't blow out the wall.
>
> As I went through, I observed that this needed that. It needed the geogrid. It needed fabric behind the wall to make sure that the wall was- so that no moisture could come through with erosion continuing after the wall was completed. So you put fabric behind the rocks, and you put your geogrid in place, you do your excavation.

R. 1548, pg. 288.

A. It was not necessary to be an engineer for Mr. Bratt to testify that a rock retaining wall would have satisfactorily resolved the erosion issue.

Mr. Bratt intended to testify that the Association could have satisfactorily resolved the erosion problem through an alternative means (i.e., construction of a rock retaining wall) at a much lower cost. Mr. Bratt did not need to be an engineer to testify that a rock wall would have satisfactorily resolved the erosion problem or to testify as to the cost of constructing the rock wall. Mr. Bratt testified that he had been building rock retaining walls for eight years, had visited the site, had reviewed the engineering plans for the two retaining walls built by the Association and had listened to the testimony of the individual (Kirk Johnson) that had built the two brick retaining walls for the Association.

Rule 702 only requires that Bratt be qualified by "knowledge, skill, experience, training, or education." Bratt's "knowledge, skill, experience and training" and preparation were sufficient to qualify Bratt to testify as to whether a rock retaining wall would have satisfactorily resolved the erosion problem and the cost thereof. The Association presented no witness that testified that only an engineer could testify as to those issues.

B. Mr. Bratt did not need to visit the site before the two retaining walls were constructed.

The Association argues that the fact that Mr. Bratt visited the site after the two retaining walls had been constructed disqualified him as an expert witness. Appellee's

Brief, pg. 30. Since the two retaining walls were built before Landrith knew he would need an expert witness, there was no way Bratt could have inspected the site before the two walls were constructed. The Association presented no witness that testified that Bratt needed to visit the site before the construction of the two retaining walls to accurately form an opinion as to whether a rock retaining wall would have satisfactorily resolved the erosion problem. In addition to visiting the site, Bratt reviewed the engineering plans used to construct the walls and listened to the testimony of the person that constructed the two brick retaining walls. The trial court errored in refusing to allow Bratt to testify at trial.

V. THE TRIAL COURT ERRORED IN GRANTING THE ASSOCIATION'S MOTION FOR DIRECTED VERDICT.

A. The trial court errored in granting the Association's motion for directed verdict as to Landrith's defense of failure to mitigate damages.

(i) The Association breached its duty to mitigate damages by refusing to allow Landrith to fix the hole. Landrith testified that he brought an independent contractor to the Property on July 23, 2004 to fix the erosion problem by "filling the hole with dirt." R. 1548, pg. 346. Anderson was there and refused to allow the work to be done, telling Landrith that this means of repairing the hole was "no longer acceptable." R. 1548, pg. 346. The Association does not dispute this account, but claims that by July 23, 2004 "an engineer was needed to inspect and repair the hole." Appellee's Brief, pg. 30.

Mr. Anderson is not an engineer and as of that meeting - July 23, 2004 - no engineer had been hired by the Association.[5] In refusing to allow Mr. Landrith to fix the erosion with an independent contractor on July 23, 2004, Mr. Anderson could not have been relying on the advise of an engineer.

Furthermore, at trial, Steven Smith, the engineer hired by the Association, testified that Mr. Landrith could have filled the "hole" with dirt - and restored the landscaping to its original condition - without constructing two new retaining walls. Mr. Smith testified that, absent an "erosion plan," over a period of time, "small riverlets" would be created and eventually "you get back in the same situation:"

> [A]t that point you'd have to have some type of an erosion plan to keep the newly placed soil while - during weather conditions, during rain runoff, during snow runoff, and if you don't then small rivulets and created and eventually larger gullies present themselves. Eventually you get to the same situation.

R. 1548, pg. 187.

Mr. Smith did not testify that "refilling" the "hole" with dirt would not resolve the erosion problem. He only testified that, over time, if there was no "erosion plan," the same erosion problem may return.

Thus, according to Mr. Smith, Mr. Landrith's plan would have worked - but may have failed at a later date if there was no erosion plan in place. If Mr. Landrith wanted to

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[5]Steven Smith was not hired until November, 2004. R. 1547, pg. 132; R. 1548, pp. 165-166.

take that risk that his solution may fail over time and additional remedial action may be needed at a later date - that was Mr. Landrith's choice. The Association failed to mitigate its damages by refusing to allow Mr. Landrith to fix the erosion through the independent contractor that Landrith brought to the Property on July 23, 2004.

A reasonable Jury could have concluded that the Association failed to mitigate its damages by refusing to allow Landrith's independent contractor to fill the "hole" in July, 2004. The Court errored in granting the Association's motion for directed verdict on the mitigation of damages issue.

(ii) Failure to use less expensive alternative means. As previously discussed, the trial court also errored in excluding Mr. Bratt's testimony, which would have provided the basis for Landrith's defense that the Association also breached its duty to mitigate by failing to use a less expensive alternative means to fix the erosion problem.

B. The trial court errored in granting a directed verdict as to Landrith's defense of material breach by the Association.

(i) No approved plans. Steven Smith's engineering firm prepared plans for the two retaining walls constructed by the Association on the Property. The Association does not dispute that those plans were never submitted to the George Osmond Estates Architectural Board, or to any other architectural board created by the Association. Appellee's Brief, pg. 33.

The Association argues that it did not have to submit those plans to the Board because the Association "acquiesced to the plans by allowing the work to go forward." Id. Section 3.3 of the Declaration does not exempt the Association from submitting plans, but provides that "no wall...shall be constructed...until plans...have been submitted to the Board and approved in writing." The exception under Section 3.6 applies only if "the Board fails to approve plans...submitted to it within thirty (30) days of submission." "Board" is defined at the "George Osmond Estate Architectural and Planning Control Board." Declaration, Section 1.1(A). In this case, the Association does not dispute that it never submitted the plans for the walls to the Board, or to any architectural committee created by the Association. Appellee's Brief, pp. 32-35.

The Declaration is a contract between the homeowners and the homeowners' association, and its covenants protect both parties. Appellant's Brief, pp. 42-43. If the Association had submitted those plans as required by Section 3.3, Landrith would have received notice of the meeting at which those plans were to be reviewed and would have had an opportunity to raise an objection to construction of the walls at that time. The City cannot unilaterally "acquiesce" in its own violation of the Declaration. The Jury could have reasonably concluded that the Association's failure to submit the plans (as required under both Sections 3.3 and 3.6) constituted a material breach of the Declaration, thereby excusing performance by Landrith.

(ii) No notice of entry of the Property. Under the Declaration, the George Osmond Estates Council had to first give "reasonable notice" to Landrith before entering the Property to perform any maintenance. Declaration, Section 6.13. Landrith testified that the Association did not give him any notice that it was entering the Property prior to construction of the two retaining walls. R. 1548, pg. 349. The Association disputes Landrith's testimony, claiming that notice was given. Appellee's Brief, pp. 35-36. Viewing the facts in a light most favorable to the non-moving party (Landrith), there was a material issue of fact in dispute that should have been resolved by the Jury - not by the Court.

(iii) No vote authorizing the $1,450.00 special assessment. Section 6.2 of the Declaration provides that assessments "shall be used for the...improvement and maintenance of the Property," but that no assessments "shall be used for capital improvements or expenditures" unless approved by a vote of "two-thirds of the membership of the Council and mortgagees:"

> The assessments levied by the Council shall be used for the purpose of promoting the health, safety, and welfare of the residents of George Osmond Estates and in particular for the improvement and maintenance of the Property, the services, and facilities devoted to this purpose and the Common Area, including but not limited to, the payment of taxes and insurance thereon and general maintenance, repair, replacement, and additions thereto, the cost of labor, equipment, materials, management, and supervision thereof. No assessments or fees hereunder shall be used for capital improvements or expenditures unless approved by a vote of two-thirds of the membership of the Council and mortgagees.

Declaration, Section 6.2. See Addendum B hereto.

As used therein, "Property" is defined to include all "real property which...is subject to the Declaration."[6] Declaration, First WHEREAS Clause, Section 2.1.

In its Brief, the Association only discussed Section 6.4, making no mention of Section 6.2. Appellee's Brief, pp. 37-39. Section 6.2 does not limit the 2/3rd vote requirement to "Common Areas" - but requires a 2/3rd vote before any assessments can be used for "capital improvements or expenditures" "with respect to the "Property," which is defined as "real property which... is subject to the Declaration." Landrith's Property is "real property which...is subject to the Declaration," and therefore is "Property" within the meaning of Section 6.2, and therefore Section 6.2 requires a 2/3rd vote before any "capital improvements or expenditures" can be made to Landrith's Property.

Landrith proposed the following Jury Instruction to assist the Jury in determining whether construction of the two retaining walls constituted a "capital improvements or expenditures" within the meaning of Section 6.2:

> [A] "capital improvement" is the addition of a permanent structural improvement or the restoration of some aspect of a property that will either enhance the property's overall value or increases it useful life.

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[6]Section 6.2 states that "assessments levied by the Council" shall be used "in particular for the improvement and maintenance of the Property, the services, and facilities and the Common Areas." "Property" is defined as "[t]he real property...which is subject to the Declaration."

R. 1368. A copy thereof is attached hereto as Addendum C.

Steven Smith, the engineer hired by the Association, testified that the two new retaining walls were intended to be "stable" and withstand pressures that may "push the retaining wall." Id. at 169. Conrad Guymon, an engineer that also did work for the Association on the design for the two new retaining walls, testified that the retaining walls were intended to be "stable" and withstand "hydrostatic pressure." Id. at 201-203. Mr. Guymon also testified that rebuilding the railroad tie wall "would not be a permanent solution" - implying that the two retaining walls were a "permanent solution." Id. at 211. A Jury could have reasonably concluded that the two retaining walls met the definition of a "capital improvements or expenditures," i.e. - they were "permanent structural improvement(s)" that "enhanced the property's overall value" - and therefore a 2/3rds vote was required under Section 6.2 of the Declaration.

The Declaration is a contract between the homeowners' association and the homeowners, with covenants for the protection of both parties. Appellant's Brief, pp. 42-43. Had the Association complied with Section 6.2, and held a vote, Landrith would have had an opportunity to argue against the construction of the two retaining walls at the time of that vote. Because the vote was never held, Landrith never had that opportunity, and a $1,450.00 "special assessment" was imposed on each homeowner to build two retaining walls on the Property that was never approved by the required 2/3rds vote.

The trial court errored in granting the Association's motion for directed verdict on the issue of whether the two retaining walls were "capital improvements," and therefore a 2/3rd vote was required under Section 6.2 of the Declaration.

(iv) No authorizing resolution. In this case, the Association produced no resolution at trial authorizing the construction of the two walls, or the assessment of the $1,450.00 special assessment to pay for the two retaining walls. Under the Association's theory of the case, it was acting as the "George Osmond Estates Council," a non-profit corporation. A corporation can act only by a resolution authorizing an action. In this case, the Association has produced no resolution authorizing any of the actions taken by the Association with respect to Landrith or the Property. Absent such a resolution, the Association had no authority to construct the two retaining walls, impose the $1,450.00 special assessment or otherwise take any action with respect to Landrith or the Property..

C. The trial court errored in granting a directed verdict as to Landrith's defense of waiver by the Association.

In Appellee's Brief, the Association summarized Landrith's evidence of waiver as follows:

> Appellant raises the argument that the [the Association] has waived its authority to act under the Declaration, because in 1977 the George Osmond Estates Council was organized by that the [the Association] did not operate pursuant to the Declaration. Specifically, Appellant notes that the [the Association] did not incorporate as a non-profit corporation, did not adopt any organizing document granting voting rights, did not give copies of its Articles of Incorporation to new

> purchasers, and did not assess one-half (½) of the annual assessments on the due dates provided in the Declaration. Appellant thus argues that a fact finder could have found that the [the Association] waived its authority to act pursuant to the Declaration and that a directed verdict was not appropriate.

Appellee's Brief, pg. 42.

The Association then stated that Landrith "has provided no evidence" of waiver. Id. Clearly, there is evidence of waiver - the Association just summarized the evidence of waiver. A reasonable Jury could conclude that the Association waived the right to act under the Declaration since the Association did not organize itself as the entity described in the Declaration and did not operate (and has not operated) in the manner described in the Declaration. The trial court errored in granting the Association's motion for direct verdict on Landrith's defense of waiver.

D. The trial court errored in granting a directed verdict as to Landrith's defense of breach of the implied covenant of good faith and fair dealing by the Association.

To find that the Association breached its implied covenant of good faith and fair dealing with Landrith under the Declaration, a finder of fact need only find that the Association breached Landrith's "justified expectations" under the Declaration that were consistent with the "common purposes" of the Declaration. Appellant's Brief, pg. 45.

In this case, Landrith testified that Anderson told Landrith that it would cost at least $100,000.00 to fix the erosion, but that if Landrith would sell the Property to him for $200,000.00 then Landrith would not have to worry about fixing the erosion. Appellant's

Brief, pg. 45-46. Landrith subsequently sold the Property for $445,000. R. 528. Anderson did not dispute the foregoing testimony at trial.

A finder of fact could have concluded that Anderson was attempting to use his position as president of the Association to advance his own pecuniary interest by using the threat of the "hole" to pressure Landrith into selling the Property to him at a discount. There was evidence on which a reasonable jury could have concluded that the Association breached its duty of good faith and fair dealing. The trial court errored in granting the City's motion for directed verdict on Landrith's defense that the City had breached its implied covenant of good faith and fair dealing.

VI. INTEREST WAS NOT CALCULATED CORRECTLY IN THE JUDGMENT.

In its Calculation of Interest, filed on December 12, 2008, the Association calculated interest pursuant to Utah Code Ann. § 15-1-1(2), rather than pursuant to the Section 6.8 of Declaration. R. 1474. In its Revised Calculation of Interest the Association also calculated interest pursuant to Utah Code Ann. § 15-1-1(2). R. 1510. The Judgment signed by the Court and drafted by the Association also calculated interest pursuant to Utah Code Ann. § 15-1-1(2). R. 1521. In its Brief, the Association provided no explanation as to why the Association calculated interest pursuant to Utah Code Annotated Section 15-1-1(2), rather than pursuant to Section 6.8 of the Declaration.

If the Association were acting pursuant to the Declaration, it would have calculated interest pursuant to the Declaration. Section 6.12 of the Declaration provides

that "[t]he cost of exterior maintenance" shall be "added to and become part of the annual assessments." Section 6.6 provides that the "annual assessments" shall be "payable in semi-annual installments" - ½ on January 1 and ½ on July 1. Section 6.8 provides that "[i]f the assessment is not paid within thirty (30) days of the delinquency date" it shall bear interest "from the date of delinquency" at the rate of 10% per annum.

In this case, the invoice dates for the $32,878.92 claimed by the Association in its Notice of Lien were as follows:

Date of invoice	Amount
5-17-05	$2,757.63
9-25-05	$13,500.00
11-01-05	$248.87
12-01-05	$13,434.43
12-01-05	$2,690.00
12-31-05	$190.49

R. 1510.

According to Section 6.8 of the Declaration, one-half ($16,439.36) would have been due on January 1, 2006 and one-half ($16,439.36) would have been due on July 1, 2006. Pursuant to Section 6.8, $16,439.36 would have accrued interest at 10% per annum from January 31, 2006 through January 12, 2009 (the date the Judgment was entered), and $16,439.36 would have accrued interest at 10% per annum from July 31, 2006 through January 12, 2009 - for a total of approximately $8,877.25 in interest.[7]

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[7]Interest on the two subsequent invoices from Rainmaker of Utah (the May 15, 2006 invoice of $74.20 and the July 15, 2008 invoice of $161.00), calculated pursuant to

Instead, the Association calculated interest from the date of invoice (not from the date of delinquency) and calculated interest under Section 15-1-1(2) for a total of $10,627.75, or about $1,750.50 more that if calculation pursuant to Section 6.8.

In its Brief, the Association states that under the Declaration, assessments incurred in 2005 should become part of the 2005 assessment:

> Appellant's calculation wrongfully applies the exterior maintenance costs incurred in 2005 to the 2006 annual assessment costs. A careful reading of the Declaration, however, indicates that the exterior maintenance costs incurred during 2005 are due as part of the 2005 annual assessment.

Appellee's Brief, pg. 46.

The Association's analysis is wrong. The "invoice date" for $13,500 was September 25, 2005, and the "invoice date" for $13,434.43 was December 1, 2005. How could those amounts have been assessed as part of the 2005 assessment, with ½ due on January 1, 2005 and ½ due on July 1, 2005, when those invoices weren't even billed until September and December, 2005.

VII. THE TRIAL COURT ERRORED IN AWARDING $403.82 IN COSTS.

In this case, the Association did not oppose Landrith's objection to $329.89 in costs - stating that the Association "would accept a reduction of costs...in the amount of $329.89." The other $74.93 was for copy costs for George Landrith's deposition (not the

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Section 6.8 the Declaration would constitute an additional $25.49 of interest, for a total of $8,902.74.

cost of George Landrith's deposition - which was claimed separately in the amount of $929.00). Copy costs are not recoverable as "costs." See Beaver v. Qwest, Inc., 2001 UT 81, 31 P.3d 1147 (Utah 2001.)

The Association provides no explanation as to why it submitted a Judgment to the Court that included costs that the Association it was "willing to reduce" - and should not have been awarded. The Court provided no explanation as to why it overruled an objection that the Association did not oppose (and agreed with).

VIII. THE TRIAL COURT ERRORED IN ITS AWARD OF ATTORNEY'S FEES.

The trial court awarded all fees claimed - with no analysis whatsoever. Landrith objected to the overall reasonableness of the attorney's fees. R. 1533. One of the examples cited by Landrith was billing Landrith for "training time" for a new attorney - Aaron Lancaster. In its Brief, the Association includes evidence that was not provided to the trial court. Appellee's Brief, pg. 51 (.Aaron Lancaster had been licensed to practice law in Nevada since October of 2006 and in Utah since May of 2007.) While that may be true, it was not presented to the trial court.

As cited in Appellant's Brief, In re Estate of Quinn, 830 P.2d 282, 285 (Utah Ct. App. 1992) requires findings of fact on attorneys' fees - and "[t]hose findings must be sufficiently detailed and include enough subsidiary facts, to disclose the steps by which the trial court's decision was reached." Id. at 286. The Association claims that In re Estate of Quinn doesn't apply since Landrith didn't provide any "evidence" to dispute the

reasonableness of the attorney's fees claimed by the Association. The "evidence" was set forth in the Objection to Form of Judgment (with Revised Calculation of Interest). R. 1528-34. In that Objection, Landrith filed an overall objection to the reasonableness of attorney's fees, citing both duplication of services and "training time" as two examples of why the attorney's fees were unreasonable. Id. at 15-29-1530.

The Association cited Cabrera v. Cottrell, 694 P.2d 622 (Utah 1985) for the proposition that the sentence in the Judgment awarding attorney's fees is a sufficient "finding of fact." The Cottrell Court only held that those findings of fact may be included in the "findings of fact and conclusions of law" set forth as part of a Judgment, and need not be separate. In this case, the trial court entered no "findings of fact or conclusions of law" relating to its award of attorney's fees, either as part of the Judgment or separately.

IX. IF SUCCESSFUL, LANDRITH SHOULD BE AWARDED ATTORNEY'S FEES.

In opposition to Landrith's request for attorney's fees on appeal if successful, the Association only cites Robertson's Marine, Inc. v. 14 Solutions, Inc., 223 P.3d 1141 (Ut.App. 2010), a case which is consistent with Landrith's position. In that case, the Court awarded attorney's fees on appeal for successfully defending an appeal on a contract claim, where the contract included an attorney's fees clause. In this case, the Declaration also includes an "attorney's fees clause." If successful on appeal, Landrith should also be awarded his attorney's fees.

Dated this 15 day of April, 2010.

Russell Cline, Attorney for Defendant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 15 day of April, 2010, I caused to be delivered two copies first class mail, postage pre-paid, the foregoing to:

Thomas W. Seiler
Robinson, Seiler & Anderson, L.C.
80 North 100 East
P.O. Box 1266
Provo, UT 84603-1266

Addendum A - Registration of Osmond Lane Homeowners Association as a dba of Nevin Anderson

Utah Department of Commerce Business Entity Search

?Help

Name	Type	City	Status
OSMOND LANE HOMEOWNERS ASSOCIATION	DBA	Provo	Active

Business Name: OSMOND LANE HOMEOWNERS ASSOCIATION
Entity Number: 5111047-0151
Registration Date: 04/22/2002
State of Origin:

Address

777 OSMOND LANE
Provo, UT 84604

Status

Status: Active
Status Description: Good Standing
This Status Date: 04/22/2002
Last Renewed: 03/05/2008
License Type: DBA
Delinquent Date: 04/22/2011

Registered Agent

Registered Agent: NEVIN N ANDERSEN
[Search BES] [Search RPS]
Address Line 1: 777 OSMOND LANE
Address Line 2:
City: Provo
State: UT
Zip: 84604

Additional Information

With this information, you can...

Images are not available for DBA documents at this time.

Purchase Certificate of Existence

If you would like to purchase a Certificate of Existence for this business entity, select the button to the left. You will be assessed a **$ 12.00 fee** for this service. You will need Adobe Reader to view this certificate. If you do not have Adobe Reader, click on the button below and download it.

Get Adobe Reader

Access Principal Information

If you would like to receive information on the principal individuals associated with this entity, click the button on the left. You will be assessed a **$ 1.00 fee** for this information.

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Addendum B - Section 6.2 of the Declaration of Protective Covenants

Section 4.2 Compliance with Council Articles, By-Laws, etc. Each Owner shall abide by and benefit from each provision, covenant, condition and restriction contained in the Articles of Incorporation and By-Laws of the Council, a copy of which is provided to each Owner at the time of purchase, and by which each Owner agrees to be bound, or which is contained in any rule, regulation, or restriction promulgated pursuant to said Articles and By-Laws. The obligations, burdens, and benefits of membership in the Council, to the extent that they touch and concern the land, shall be covenants running with each Owner's Parcel for the benefit of all other Parcels and the Common Area.

Section 4.3 Voting Rights. The voting rights of the members shall be as specified in the Articles of Incorporation.

ARTICLE V

RIGHTS IN THE COMMON AREA

Section 5.1 Members' Licenses of Enjoyment. Every member of the Council shall have an irrevocable license to enjoy the Common Area. Access to the private road may be controlled by a lockable gate, provided that said gate must meet all requirements of the City of Provo and other governmental agencies.

Section 5.2 Title to Common Area. The Declarant, its successors and assigns shall retain the legal title to the Common Area until such time as it has completed improvements thereon and until such time as, in the opinion of the Declarant, the Council is able to maintain the same, but notwithstanding any provisions herein, the Declarant hereby covenants, for itself, its heirs and assigns, that it shall convey the Common Area to the Council not later than October 1, 1978.

Section 5.3 Right to Transfer. The right of the Council to dedicate or transfer all or any part of the Common Area to any public agency, authority, or utility for such purposes and subject to such conditions as may be agreed to by the members, provided that no such dedication or transfer, determination as to the purposes or as to the conditions thereof, shall be effective unless an instrument signed by members entitled to cast two-thirds (2/3) of the votes has been recorded, agreeing to such dedication, transfer, purpose or condition, and unless written notice of the proposed agreement and action thereunder is sent to every member at least thirty (30) days in advance of any action taken.

ARTICLE VI

COVENANT FOR MAINTENANCE ASSESSMENTS

Section 6.1 Creation of the Lien and Personal Obligation of Assessments. Each Owner of any Parcel by acceptance of a deed therefor, whether or not it shall be so expressed in any such deed or other conveyance, agrees to pay to the Council: (1) annual assessments or charges as provided herein; and (2) special assessments for capital improvements, such assessments to be fixed, established, and collected from time to time as hereinafter provided. The annual and special assessments, together with such interest thereon and costs of collection thereof as hereinafter provided, shall be a charge on the land and shall be a continuing lien upon the property against which each such assessment is made until paid. Each such assessment, together with such interest thereon and cost of collection thereof as hereinafter provided, shall also be the personal obligation of the person who was the Owner of such Parcel at the time when the assessment fell due.

Section 6.2 Purpose of Assessments. The assessments levied by the Council shall be used for the purpose of promoting the health, safety, and welfare of the residents of George Osmond Estates and in particular for the improvement and maintenance of the Property, the services, and facilities devoted to this purpose and the Common Area, including but not limited to, the payment of taxes and insurance thereon and general maintenance, repair, replacement, and additions thereto, the

cost of labor, equipment, materials, management, and supervision thereof. No assessments or fees hereunder shall be used for capital improvements or expenditures unless approved by a vote of two-thirds of the membership of the Council and mortgagees.

Section 6.3 Assessments. Annual assessments shall begin in the year beginning January 1, 1978. Unless changed by vote of the membership, the maximum annual assessment for any Parcel shall be $200.00 per year. The Board of Managers of the Council may, after consideration of the current maintenance costs and the financial requirements of the Council, fix the actual assessment at an amount less than the maximum.

The maximum annual assessment may be charged as follows:

A. From and after January 1, 1978, the maximum annual assessment may be increased each year not more than 10% above the maximum assessment for the previous year without a vote of the membership.

B. From and after January 1, 1978, the maximum annual assessment may be increased above 10% by a vote of one-half (1/2) of the members who are voting in person or by proxy, at a meeting duly called for this purpose.

C. The Board of Managers may fix the annual assessment at an amount not in excess of the maximum.

Written notice of any meeting of members called to change the maximum annual assessment shall be sent to all members at least thirty (30) days in advance of the date of such meeting, setting forth the purposes of the meeting.

Section 6.4 Special Assessments for Capital Improvements. In addition to the annual assessments authorized by Section 6.3 hereof, the Board of Managers of the Council may levy a special assessment for the purpose of defraying, in whole or in part, the cost of any construction or reconstruction, unexpected repair or replacement of any capital improvements upon the Common Area, including the necessary fixtures and personal property related thereto, provided that any such assessment shall have the assent of two-thirds (2/3) of the votes of the Council who are voting in person or by proxy at a meeting duly called for this purpose, written notice of which shall be sent to all members at least thirty (30) days in advance and shall set forth the purpose of the meeting.

Section 6.5 Quorum. A quorum for any action authorized under Sections 6.3 and 6.4 hereof shall be as follows:

At the first meeting called, as provided in Sections 6.3 and 6.4 hereof, the presence at the meeting of members, or of proxies entitled to cast sixty percent (60%) of all votes of the Council shall constitute a quorum. If the required quorum is not forthcoming at any meeting, another meeting may be called, subject to the notice requirements set forth in Sections 6.3 and 6.4 and the required quorum at any such subsequent meeting shall be one-half of the required quorum at the preceding meeting, provided that no such subsequent meeting shall be held more than sixty (60) days following the preceding meeting.

Section 6.6 Payment of Annual Assessments: Due Dates. The annual assessments provided for herein shall be payable in semi-annual installments (1/2 of the annual assessment) on the first day of each January and July of each year. The due date of any special assessments under Section 6.4 hereof shall be fixed in the resolution authorizing such assessment.

Section 6.7 Duties of the Council. The Council shall, at least ten (10) days in advance of the assessment date or period, prepare a roster of the properties and assessments applicable thereto which shall be kept in the office of the Council and shall be open to inspection

Addendum C - Proposed Jury Instruction defining "Capital Improvements"

INSTRUCTION NO. _____

An "capital improvement" is the addition of a permanent structural improvement or the restoration of some aspect of a property that will either enhance the property's overall value or increases its useful life.

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